

NOTICES OF EMERGENCY RULEMAKING

Under the Administrative Procedure Act, an agency may determine that adoption, amendment, or repeal of a rule is necessary for immediate preservation of the public health, safety, or welfare and the notice and public participation requirements are impracticable. Under this determination, the agency may adopt the rule as an emergency and submit it to the Attorney General for review. The Attorney General approves the rule and then files it with the Secretary of State. The rule remains in effect for 180 days. An emergency rule may be renewed for one 180-day period if the requirements of A.R.S. § 41-1026 are met. If the emergency rule is not renewed or the rule is not permanently adopted by the end of the 180-day period, the emergency rule expires and the text of the rule returns to its former language, if any.

NOTICE OF EMERGENCY RULEMAKING

TITLE 12. NATURAL RESOURCES

CHAPTER 15. DEPARTMENT OF WATER RESOURCES

[R05-253]

PREAMBLE

- 1. Sections Affected**

R12-15-701 R12-15-703 R12-15-717	<u>Rulemaking Action</u> Amend Amend Amend
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- 2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**

Authorizing statutes: A.R.S. §§ 45-105(B)(1) and 45-576(H)
Implementing statutes: A.R.S. §§ 45-108 and 45-576
- 3. The effective date of the rules:**

June 29, 2005

Pursuant to A.R.S. § 41-1026(D), these emergency amendments should be effective immediately upon filing with the Office of the Secretary of State. Additionally, per A.R.S. § 41-1032, the immediate effectiveness of these amendments will preserve the public peace, health or safety. As discussed in Section 6 below, these emergency amendments will close a “loophole” in the Assured and Adequate Water Supply rules that could require the Department of Water Resources to over-allocate groundwater resources, potentially threatening the long-term supply of groundwater within certain areas of the state. Accordingly, these emergency amendments should become effective as soon as they are approved by the Attorney General and filed with the Office of the Secretary of State so that the loophole is closed as soon as possible.
- 4. Is this rulemaking a renewal of a previous emergency rulemaking?**

No.
- 5. The name and address of agency personnel with whom persons may communicate regarding the rule:**

Name:	Kenneth Slowinski Legal Division
Address:	Arizona Department of Water Resources 500 N. Third St. Phoenix, AZ 85004
Telephone:	(602) 417-2420
Fax:	(602) 417-2415
- 6. An explanation of the rule, including the agency’s reasons for initiating the rule:**

The Department of Water Resources (“DWR”) recently became aware of a potential “loophole” within its administrative rules that could require DWR to over-allocate groundwater resources, threatening the long-term supply of groundwater within certain areas of the state. DWR now seeks to close the loophole by amending A.A.C. R12-15-701, R12-15-703 and R12-15-717 through the emergency rulemaking procedure set forth in A.R.S. § 41-1026.

Under the Assured Water Supply Program (“AWS Program”), set forth in A.R.S. § 45-576, a person proposing to offer subdivided land for sale or lease in an Active Management Area (“AMA”) must first either obtain a certificate of assured water supply from DWR or obtain a written commitment of water service from a water provider that has been designated by DWR as having an assured water supply. Complementing the AWS Program is the Adequate Water Supply Program (“Adequacy Program”), which is set forth in A.R.S. § 45-108, and which applies to subdivided lands outside the AMAs. In 1995, pursuant to a formal rulemaking process, DWR adopted the Assured and Adequate Water Supply Rules (the “Rules”), which govern the application process and set forth the requirements an applicant must meet for satisfying the statutory criteria under both the AWS Program and the Adequate Water Supply Program.

Under the AWS Program, an applicant must demonstrate, among other things, that the water supply for the proposed use is a continuously available supply sufficient to satisfy the needs of the subdivision or service area for 100 years. A.R.S. § 45-576(I). The AWS Program rule implementing this requirement is R12-15-703. R12-15-703(B)(1)(c) provides that the director of DWR (the “Director”) shall consider groundwater to be physically available to an applicant for 100 years only if the groundwater will be withdrawn from depths not to exceed a specified maximum 100-year depth-to-static water level.

R12-15-703(B)(1)(d) sets forth a formula for calculating the 100-year depth-to-static water level for an applicant’s proposed use under the AWS Program. The depth-to-static water level for an application is determined by adding together the following: (1) the depth-to-static water level for the area on the date the application is filed; (2) the projected 100-year decline in the depth-to-static water level for the area caused by existing demand; (3) the projected 100-year decline in the depth-to-static water level for the area caused by committed demand (defined by R12-15-701(10) as the estimated demand of all recorded lots in the area that are not yet served water) and the demand of developments for which the Director has issued an analysis of assured water supply, less the projected demand of subdivided lots whose plats have been abandoned; and (4) the projected 100-year decline in depth-to-static water level for the area that the Director projects will result from the applicant’s proposed use. Rule R12-15-717 sets forth a similar formula for the Adequacy Program.

One of the primary purposes of R12-15-703(B)(1)(c) and (d) is to prevent an over-allocation of the groundwater supply to subdivisions and water providers. Therefore, if the projected decline in the depth-to-static water level caused by the applicant’s proposed use of groundwater over a 100-year period *in combination with the projected decline caused by all existing and previously authorized groundwater uses in the area over the 100-year period* will exceed the maximum 100-year depth-to-static water level for the area, then the Director will determine that the supply is not physically available.

The problem with the current version of the Rules concerns the language in R12-15-701(10), which defines the term “committed demand,” the language in R12-15-703(B)(1)(d), which sets forth the method for calculating the projected decline in the depth-to-static water level for applications made pursuant to the AWS Program, and the language in R12-15-717(B)(1)(d), which sets forth the method for calculating the projected decline in the depth-to-static water level for applications made pursuant to the Adequacy Program. When DWR adopted the Rules in 1995, it intended to include within the depth-to-static water level calculation the projected decline caused by *all* of the groundwater demand within a particular area. During the ten years in which the Rules have been in effect, DWR has consistently applied the Rules in this manner.

However, a potential subdivider recently alerted DWR to the fact that the depth-to-static water level calculations in the Rules do not include all of the groundwater demand of previously granted applications. Specifically, the demand of lots within subdivisions which have been approved by DWR but that have not yet been recorded with the county recorder’s office is *not* included within the projected depth-to-static water level calculations of R12-15-703(B)(1)(d) and R12-15-717(B)(1)(d). These groundwater demands represent the projected demands of future developments for which plats have not yet been recorded, but that have the necessary approvals and may be built at any time. Additionally, the applicants have the necessary approval from DWR to obtain a public report and to begin offering lots for sale to the public. Accordingly, they *should* be counted when determining whether there is a groundwater supply physically available for new applications; otherwise, once those developments are actually built, their groundwater demands will cause an unaccounted-for decline in the depth-to-static water level in the area.

The solution to this problem is to amend the Rules as follows: (1) amend the definition of “committed demand” in R12-15-701(10) to include the 100-year groundwater demand of those lots included within Certificates of Assured Water Supply and Reports of Adequate Water Supply that are not yet recorded; and (2) amend R12-15-703(B)(1)(d) and R12-15-717(B)(1)(d) to include in the calculation of the depth-to-static water level the projected demand included within Designations of Assured Water Supply (both as to the AWS Program and the Adequacy Program) that is not yet existing demand or committed demand.

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

Notices of Emergency Rulemaking

8. The summary of the economic, small business, and consumer impact:

Pursuant to A.R.S. § 41-1055(D), an economic, small business, and consumer impact statement is not required as this is the initial making of an emergency rule under A.R.S. § 41-1026.

9. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable

10. Incorporations by reference and their location in the rules:

None

11. An explanation of the situation justifying the rule's making as an emergency rule:

Pursuant to A.R.S. § 41-1026(A), the Department has determined that the adoption of these amendments is necessary as an emergency measure to avoid serious prejudice to the public interest. Rules R12-15-701, R12-15-703 and R12-15-717 as currently drafted could result in the over-allocation of groundwater resources, thus threatening the long-term supply of groundwater within certain areas of the state.

While DWR intends to permanently amend these rules through the formal rulemaking process it requests emergency adoption pursuant to A.R.S. § 41-1026(A) in order to close the loophole as soon as possible. Moreover, publicizing the loophole could lead to a rush to certification by applicants seeking to take advantage of the incorrect calculation method. Such a rush to certify by applicants would very likely result in an over-allocation of groundwater resources by DWR in some areas of the state.

12. The date of the attorney general's approval of the emergency rule: June 28, 2005

13. The full text of the rules follows:

TITLE 12. NATURAL RESOURCES

CHAPTER 15. DEPARTMENT OF WATER RESOURCES

ARTICLE 7. ASSURED AND ADEQUATE WATER SUPPLY

Section

- R12-15-701. Definitions - Assured and Adequate Water Supply Programs
R12-15-703. Assured Water Supply Requirement - Physical Availability; Continuous Availability; Legal Availability
R12-15-717. Adequate Water Supply Requirement-Physical Availability

ARTICLE 7. ASSURED AND ADEQUATE WATER SUPPLY

R12-15-701. Definitions - Assured and Adequate Water Supply Programs

In addition to the definitions set forth in A.R.S. §§ 32-2101, 45-101, 45-402, 45-561, 45-576, 45-651, 45-802, 45-851, and 45-1901, the following words and phrases in this Article shall have the following meanings, unless the context otherwise requires:

1. No change
2. No change
3. No change
4. No change
5. No change
6. No change
7. No change
8. No change
9. No change
10. "Committed demand" means the estimated demand of all ~~recorded lots~~ of the following within the boundaries of the area being evaluated for physical availability:
 - a. All recorded lots which are not yet served water.
 - b. All unrecorded lots included within water reports, as defined in R12-15-715, and certificates of assured water supply.
11. No change
12. No change
13. No change
14. No change
15. No change

- 16. No change
- 17. No change
- 18. No change
- 19. No change
- 20. No change
- 21. No change
- 22. No change
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- 38. No change
- 39. No change
- 40. No change
- 41. No change
- 42. No change
- 43. No change
- 44. No change
- 45. No change
- 46. No change
- 47. No change
- 48. No change
- 49. No change
- 50. No change
- 51. No change

R12-15-703. Assured Water Supply Requirement - Physical Availability; Continuous Availability; Legal Availability

A. No change

B. No change

1. No change

a. No change

i. No change

ii. No change

iii. No change

b. No change

c. No change

d. No change

i. No change

ii. No change

iii. The projected decline in the depth-to-static water level for the area from which groundwater withdrawals are proposed to occur during the 100-year period after the date of application, calculated by adding the projected groundwater demand of items (B)(1)(d)(iii)(1), ~~and (2) and (3).~~ and then subtracting the projected demand of item (B)(1)(d)(iii)~~(3)(4)~~:

(1) Committed demand.

(2) The projected demand included within designations of assured water supply that is not existing demand or committed demand.

~~(2)(3)~~ Other lots within developments for which the director has issued an analysis of assured water supply pursuant to R12-15-712.

- ~~(3)~~(4) The projected demand of subdivided lots whose plats have been abandoned.
- iv. No change
 - 2. No change
 - a. No change
 - b. No change
 - i. No change
 - ii. No change
 - 3. No change
 - a. No change
 - b. No change
 - c. No change
 - i. No change
 - ii. No change
 - iii. No change
 - iv. No change
 - v. No change
 - d. No change
 - 4. No change
 - a. No change
 - b. No change
 - i. No change
 - ii. No change
 - iii. No change
 - iv. No change
 - v. No change
 - c. No change
 - 5. No change
 - a. No change
 - i. No change
 - ii. No change
 - b. No change
 - 6. No change
 - a. No change
 - b. No change
 - i. No change
 - ii. No change
 - iii. No change
 - iv. No change
 - 7. No change
 - a. No change
 - b. No change
 - c. No change
 - i. No change
 - ii. No change
 - iii. No change
 - iv. No change
 - v. No change
 - d. No change
 - 8. No change
 - 9. No change
 - 10. No change
 - C.** No change
 - D.** No change
 - E.** No change
 - F.** No change
 - G.** No change
 - H.** No change
 - I.** No change
 - J.** No change

K. No change

L. No change

R12-15-717. Adequate Water Supply Requirement-Physical Availability

A. No change

B. No change

1. No change

a. No change

i. No change

ii. No change

iii. No change

b. No change

c. No change

d. No change

i. No change

ii. No change

iii. The projected decline in the depth-to-static water level for the area from which groundwater withdrawals are proposed to occur during the 100-year period after the date of application, calculated by adding the projected groundwater demand of items in subsections (B)(1)(d)(iii)(1), (2) and (3), and then subtracting the projected demand of item in subsection (B)(1)(d)(iii)(~~3~~)(4):

(1) Committed demand.

(2) The projected demand included within designations of adequate water supply that is not existing demand or committed demand.

~~(2)(3)~~Other lots within developments for which the director has issued an analysis of adequate water supply pursuant to R12-15-723.

~~(3)(4)~~The projected demand of subdivided lots whose plats have been abandoned.

iv. No change

e. No change

2. No change

a. No change

b. No change

i. No change

ii. No change

3. No change

a. No change

b. No change

c. No change

i. No change

ii. No change

iii. No change

d. No change

4. No change

a. No change

b. No change

i. No change

ii. No change

iii. No change

c. No change

5. No change

a. No change

i. No change

ii. No change

b. No change

6. No change

a. No change

b. No change

i. No change

ii. No change

iii. No change

Notices of Emergency Rulemaking

- iv. No change
- 7. No change
- 8. No change
- C.** No change
- D.** No change
- E.** No change
- F.** No change
- G.** No change
- H.** No change
- I.** No change
- J.** No change